IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 428 - 430

HOSKYN & CO., INC., *et al.*,
Petitioners.

—against—

SILVER LINE, LTD.,
Respondent.

INTERNATIONAL STANDARD ELECTRIC CORP., *et al.*,
Petitioners,

—against—

SILVER LINE, LTD.,
Respondent.

CHINA GENERAL EDISON CO., INC.,
Petitioner.

—against—

SILVER LINE, LTD.,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

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The Petition of:

HOSKYN & CO., INC.; CIA GRAL DE TABACOS DE FILIPINAS; LIZARES & CO., INC.; PACIFIC COMMERCIAL COMPANY; CASTELLS Y CIA; and ELIZALDE & CO., INC.; and

INTERNATIONAL STANDARD ELECTRIC CORPORATION and A. E. CHEW; and

CHINA GENERAL EDISON CO., INC.

for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Matter Involved.

Your petitioners, Hoskyn & Co., Inc., et al., were the owners of cargo laden in United States ports in October and November, 1936, on the British motorship "Silvercypress", owned and operated by respondent, for carriage to Ilo Ilo, Philippine Islands, and other Far Eastern ports. Fire broke out on the vessel on January 13, 1937, while she was discharging cargo at Ilo Ilo and a large part of petitioners' cargo was damaged or destroyed as the result of the fire or means employed to extinguish it.

Certain of the petitioners were required by respondent to pay a second freight covering on-carriage from Ilo Ilo to ports of ultimate destination of that part of the cargo which was not destroyed, although full freight to the ultimate destination had been prepaid to respondent at the time of original shipment; and certain petitioners were required to make deposits of cash with respondent as security for contributions in general average alleged to be due in connection with the fire.

Eighteen separate libels were filed by 123 different cargo owners against the respondent in the United States District Court for the Southern District of New York to recover for the losses suffered by cargo, the amounts of the second freights, and the amounts of the cash deposits. The damages suffered by the cargo owners totaled approximately $500,000, including cash deposits required by respondent totaling about $125,000. As a matter of convenience the parties chose four libels as typical of all and it was stipulated that the rights of the parties in the other 14 libels should abide by determination of these four cases. Only these four libels were tried.

The cargo owned by the petitioners-libellants in the case of *Hoskyn & Co., et al.* was totally destroyed as the result

of contact with fire and water; that of the petitioners-libellants in the case of *International Standard Electric Corp., et al.* sustained partial damage through contact with fire and water and these cargo owners were required to pay second freights for on-carriage of the salved cargo from Ilo Ilo to the ultimate ports of destination. The District Court found that the respondent was entitled to exoneration from liability for the losses suffered by these libellants under the provisions of the Fire Statute (46 U. S. C. Sec. 182),* and decrees dismissing both these libels were entered (R. 1342-1343). On appeal to the Circuit Court of Appeals for the Second Circuit, those decrees were affirmed.

The cargo owned by the petitioner-libellant in the case of *China General Edison Co., Inc.* sustained partial damage through contact with fire and water and that company was required by the respondent to make a general average deposit and pay a second freight. In this case an interlocutory decree was entered in the District Court (R. 1344-1345) whereby it was ordered that the libellant recover from respondent the amount of the general average deposit which respondent required be paid over as security, unless within 12 months from the entry of the decree (or within such additional time as might be allowed) respondent should make an accounting by the issuance of a proper general average statement; and if a proper general average statement were issued within the period set and showed that the general average deposit paid over by this libellant exceeded the contribution set out as due, the decree provided that it should recover that excess only.

In all other respects this libel was dismissed, the District Court finding that the respondent was exonerated

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* Printed in Appendix.

from liability, under the provisions of the Fire Statute, for the loss of and damage to this libellant's cargo resulting from the fire or water used to extinguish it, or for the second freight; and the effect of the court's decree concerning the recovery of the general average deposit was that this libellant was held liable for contribution in general average, the respondent merely being required to make an accounting establishing the amount of the liability, so that it might be determined if the deposit given as security exceeds the libellant's liability. The respondent has made no accounting of any kind in the more than seven years since the deposits were collected.

As all parties and the courts below are in accord that cargo's liability for contribution in general average is governed by the same considerations which govern respondent's liability for the loss of the cargo resulting from the fire, the *China General Edison* case (excepting as to the respondent's obligation to account for any balance of the general average deposit) is governed by the same principles as govern the cases of *Hoskyn & Co., et al.* and *International Standard Electric Corp., et al.*

The decree in the *China General Edison* case was also affirmed on appeal.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 143 F. (2d) 462. It appears in the record at pages 1369-1375. The opinion of the United States District Court for the Southern District of New York is not yet officially reported. It appears in the record at pages 1296-1332. Its supplemental memorandum (not yet reported) appears in the record at pages 1332-1337. The Findings of Fact and Conclusions of Law of the District Court appear in the record at pages 1337-1341.

Petitioners examined but one factual and one expert witness at the trial. They relied almost entirely upon the testimony of respondent's witnesses and respondent's records. The facts outlined in this petition will be those found by the Circuit Court of Appeals supplemented by reference to the findings and opinion of the District Court.

Jurisdiction.

Jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. Code, Sec. 347).

Nature of the Case.

The M/S "Silvercypress" was in large part electrically operated: her auxiliary machinery, winches, ranges, and lighting system were electrical. Electricity was provided by four generator units situated two on the port side and two on the starboard side of the engine room. Each unit consisted of a generator connected to a Diesel engine. #1 and #2 generator units were situated on the starboard side of the engine room and #3 and #4 units on the port side.

Upon the arrival of the "Silvercypress" at Ilo Ilo early on the afternoon of January 12th, 1937, the main propelling machinery was shut down. Generator units #1 and #2 were used from that time to the time of the fire to provide electricity for the winches used in the discharge of cargo, and for other purposes.

A fuel oil fire broke out at 3:45 A. M. on January 13th, which was caused by the Diesel engine forming part of

the #2 generator unit. The fire spread with great rapidity and intensity, flames soon mounting out of the engine room skylight. As cargo was being discharged at the time, the vessel's hatches were open. Various awnings and other material on deck became ignited and pieces fell through the open hatches aft and ignited the cargo. Fire was also communicated to the hold immediately forward of the engine room and eventually to the afterpeak tank containing kerosene oil. The fire burned for seven days before it was extinguished. The cargo stowed in the after holds, the afterpeak tank, and in the hold immediately forward of the engine room was either totally destroyed or sustained very serious damage either from fire or water used to extinguish the fire, or both. The vessel herself was reduced to a wreck.

The respondent pleaded the Fire Statute (46 U. S. C. Sec. 182) in defense against the suits. That statute provides that a vessel owner shall not be liable for loss or damage to cargo resulting from fire "unless such fire is caused by the design or neglect of such owner". Petitioners contended that the fire resulted from the respondent's personal neglect and that, therefore, it was not entitled to exoneration under the Fire Statute.

The Decisions of the Courts Below.

Both the Circuit Court of Appeals and the District Court found:

1. That the fire in the engine room of the "Silvercypress" was caused by the auxiliary Diesel engine forming part of the #2 generator set (C. C. A., R. 1369, 1371, 1373, 1374-1375; D. C., R. 1306, 1323-1327);

2. That that engine was unseaworthy at the time the

fire broke out and had been unseaworthy for a number of months (C. C. A., R. 1371, 1374; D. C., R. 1330-1331);

3. That the unseaworthiness of the #2 auxiliary engine existed by reason of respondent's personal neglect (C. C. A., R. 1371, 1374; D. C., R. 1330-1331);

4. That the unseaworthiness of the #2 engine was of a type which presented the danger of fire through overheating and excessive vibration, and that the fire which broke out could have been caused by this unseaworthiness (C. C. A., R. 1371, 1374; D. C., R. 1332);

5. That if the unseaworthiness of #2 engine caused the fire, respondent is liable to petitioners for their losses (C. C. A., R. 1371, 1374; D. C., R. 1330-1331).

It appears also, from the opinion of the District Court, that an additional fire hazard was created by the accumulation on the engine room tank tops and in the bilges, of lubricating oil which leaked out of the crank cases of the main engines of the "Silvercypress" by reason of the personal neglect of the respondent. In fact, this is one of the dangerous conditions to which the District Court referred in the following passage in its opinion:

> "These letters gave the owners notice of serious existing defects which certainly required specific attention by their accredited representative in Hongkong, and the indifference and inattention of Stevenson and Cropley, is incredible" (R. 1313; brief, *infra*, pp. 28-33).

Although there were two engineers on duty in the engineroom when the fire started, the fire spread so rapidly that it could not be controlled.

Respondent's superintending engineers who were familiar with the "Silvercypress", the engineers who served on her, the experts examined by petitioners and respondent, and the courts below, collectively advanced but two possible causes for the presence of a quantity of loose fuel oil in the vicinity of the #2 engine which could become ignited:

1. Fracture of one of the fuel lines on the top of the engine leading oil to the cylinders under a pressure of 3500 pounds.

2. Fracture of the main supply pipe leading oil from the main supply tank to the engine itself under a pressure of less than 10 pounds.

The courts below were in accord that if the loose fuel oil which became ignited resulted from the fracture first mentioned, the respondent would be liable: that fracture would have resulted from the established unseaworthiness of the engine resulting from respondent's neglect (C. C. A., R. 1371, 1373, 1374; D. C., R. 1310, 1331-1332). A fuel oil fire a few months before, on the #4 engine, had resulted from the fracture of one of the fuel lines on the top of that engine; that fracture had resulted from the unseaworthiness of that engine; and oil spraying from the fracture became ignited because the engine was overheated (R. 1310).

The lower courts held that if the loose fuel oil resulted from the second of the fractures mentioned above (*i. e.*, a fracture of the main supply pipe), respondent would not be liable therefor under the Fire Statute. In view of the fact that both pipes were attached to the unseaworthy engine and therefore were subject to similar stresses, we are unable to understand this distinction in

liability, but we shall assume it for the purposes of this petition.

The courts below held that respondent was entitled to exoneration from liability under the Fire Statute because respondent's expert testimony persuaded them that leakage of fuel oil from the overhead main supply pipe—if there was any—was a possible explanation for the loose fuel oil around the engine which became ignited. This expert evidence is wholly unsupported by any factual evidence to show that there ever was any leakage from the overhead main supply pipe. On this point the Circuit Court of Appeals said (R. 1374):

> "A bit of hearsay* in a report by one of the engineers that there was such a leak was not given credence by the judge, however, and there was nothing else to put the idea above the level of surmise."

There was no evidence that the main supply pipe was in any way defective or weak so as to present the danger that it might fracture or leak.

The Questions Presented.

A.

Where it appears that a defective condition due to the shipowner's personal neglect supplies a natural and probable explanation of a fire on shipboard, and there is no factual evidence to support any other explanation, can the shipowner escape liability under the Fire Statute by merely calling experts to speculate as to other possible causes?

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* This evidence was excluded excepting for its bearing on the credibility of the witness.

B.

Where it is definitely established that the fire was caused by a defective engine and that the defective condition of the engine created a fire hazard and was due to the personal neglect of the shipowner, can the shipowner escape liability under the Fire Statute by calling experts to testify (in the absence of any factual basis for their testimony) that the defective engine might have caused the fire in a manner for which the owner would not be responsible?

Petitioners do not question the rule applied by the lower courts (C. C. A., R. 1370; D. C., R. 1297) that where a shipowner sets up the Fire Statute as a defense in a suit brought by a cargo owner to hold him liable for loss of cargo by fire, the cargo owner must sustain the burden of establishing that the fire resulted from the shipowner's personal neglect.

Petitioners agree also that no matter how unseaworthy the "Silvercypress" was by reason of respondent's neglect, they cannot recover unless such unseaworthiness contributed to the loss of their cargo by fire.

The question presented here is whether in the face of a proved condition of unseaworthiness creating a fire hazard and adequate to explain the fire, and due to the long continued neglect of the shipowner himself, the shipowner can escape liability by merely pointing to other possible explanations of the fire, without submitting any evidence whatever to support such hypothetical explanations.

Stated in another way, the question is whether the cargo owner makes out a case by showing that the fire was directly caused by a defective engine; and that the defective condition of the engine created a fire hazard

and was due to the shipowner's personal neglect. That is exactly what the cargo owners proved in the present case, and their proof was held insufficient because they did not negative the theoretical possibility that the fire (although admittedly started by the defective engine) might have started in some way for which the shipowner would not have been liable. The Circuit Court of Appeals pointed out that this theory rests on mere "surmise" (R. 1374), and its statement of the theory (expressed almost entirely in the subjunctive mood) clearly shows its highly speculative character (R. 1371, 1374-1375).

We ask the Court to bear in mind that this is not a case of a vessel lost with all on board, where no evidence is available to either side. On the contrary, all of the engine room personnel of the "Silvercypress" survived the fire, and most of them were called by the respondent at the trial; but not one of these witnesses was interrogated with respect to any leakage or breakage of the main fuel supply pipe, on which respondent's experts based their alternative explanation of the fire. Moreover, it appears from the opinion of the District Court that one of the witnesses called by the respondent was standing immediately under that pipe when the fire broke out, so that it would have been humanly impossible for any substantial leakage from the pipe to escape his notice (R. 1306, 1308, 1328, 1329). With all this factual testimony available to it the respondent chose not to present it but to rely solely on the speculations of experts to support its theory.

If the defects proved in this case had been due to design instead of neglect, we submit that a man could easily be convicted of arson on this record, under the rule applied in criminal cases that guilt must be proved beyond a reasonable doubt.

Reasons for Allowance of the Writ.

I.

In this case the petitioners were required to carry a heavier burden than the prosecutor in a criminal case; they were required to prove a universal negative. The application of such a rule in cases arising under the Fire Statute is wholly unsupported by authority; it is squarely contrary to the rule applied in the First, Fourth and Sixth Circuits as well as the Second Circuit, in fire cases not involving the Fire Statute, and to the rule applied in the Fourth Circuit (the only other circuit where the question has been squarely presented) in cases under the Fire Statute.

In *Int. Mercantile Marine* v. *W. & A. Fletcher Co.*, 296 Fed. 855 (C. C. A. 2), suit was filed by a vessel owner against a ship repair company to recover for damage to a ship resulting from fire which broke out during the course of repairs. There was evidence that the negligence of the repairer's employees presented the danger of fire but no direct evidence that the fire resulted from that negligence. The Circuit Court of Appeals for the Second Circuit held (at p. 858):

> "Liability is measured by the known dangers to be guarded against, and if care according to the circumstances is wanting, the natural inference is that injury accrues from the known danger—it is caused by the lack of care. The blowtorch near remover and waste was negligence; the danger of fire was well known, and we find adequate cause proximately existing in that negligence for the ensuing loss."

See, also:

Standard Oil Co. of N. Y. v. *Pitcher Co.*, 289 Fed. 678 (C. C. A. 1);

Brown v. *Standard Oil Co. of N. Y.*, 247 Fed. 303 at p. 306 (C. C. A. 2);

Interlake Iron Corp. v. *Gartland S. S. Co.*, 121 F. (2d) 267 at p. 270 (C. C. A. 6).

In *U. S.* v. *Charbonnier*, 45 F. (2d) 174 (C. C. A. 4), suit was by a cargo owner against a vessel owner to recover for fire damage to cargo and the vessel owner pleaded the Fire Statute in defense. It was established that unseaworthiness of the vessel existing by reason of the owner's personal neglect presented the danger of fire but there was no definite proof that such unseaworthiness caused the fire. The Circuit Court of Appeals for the Fourth Circuit pointed out that the vessel owner had offered expert testimony of a possible cause of the fire for which it would not be liable but it held that by reason of the vessel owner's personal neglect (at p. 176) "a situation was created which, in the opinion of the experts, made possible a fire, and helped to bring about the catastrophe which took place"; and the vessel owner was held liable.

In *The Bank Line, Ltd.* v. *Porter*, 25 F. (2d) 843 (C. C. A. 4), in considering causal relationship under the Fire Statute, the Circuit Court of Appeals for the Fourth Circuit said (at p. 846):

> "Knowledge of facts that may be reasonably expected to lead to certain results imposes a direct liability for those results."

In *Christopher* v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1) and *The New Berne*, 80 F. (2d) 244 (C. C. A. 4), fires broke out in the engine rooms of different vessels resulting in loss of life. The vessel owners filed petitions for limitation of their liability.* In each case the engineer who was the sole witness to the outbreak of the fire lost his life in the disaster and there was, therefore, no definite evidence concerning the cause of the fire. However, it was found in both cases that the respective vessels were unseaworthy with the privity of their owners and that the unseaworthiness presented the danger of fire. In both cases the petitioning vessel owners took the position that there was no proof that the fires resulted from the unseaworthiness and a number of other possible causes for the outbreak of the fires were advanced.

In *Christopher* v. *Grueby*, after discussing the possible causes of the fire, the Circuit Court of Appeals for the First Circuit said that whatever may have been the precise cause (at p. 13):

> "it can reasonably be found that the negligent situation which the owners had created and/or suffered to exist in the engine room, and their failure to furnish adequate means 'ready for immediate use' for 'promptly and effectually extinguishing gasoline' one or both, were the cause of the loss of the ship, of the lives of 12 of the crew, and of the injury of three others."
>
> "If the engineer was careless in pouring gasoline when the engine or engines were running, nevertheless the owners could reasonably have foreseen that he might do so, and their negligence in suffering this

* The limited liability statute, 46 U. S. C. 183, is printed in the Appendix.

> fire hazard to exist in the engine room could be found to be the proximate cause of the disaster, and we think it was."

In *The New Berne* the Circuit Court of Appeals for the Fourth Circuit said (at p. 247) that the origin of a fire—

> "must in most cases be established by circumstantial evidence; and the probative effect of such evidence ought not be disregarded because the ingenuity of counsel may suggest a number of ways in which such fires might have originated."

The court discussed the circumstantial evidence available which made it probable that the fire resulted from the vessel's unseaworthiness and said (at p. 246) that it would be foolish to attribute the origin of the fire to the speculative hypotheses advanced by the vessel owner. In dealing with one of these hypotheses the court said (at p. 246):

> "It would be inexcusable to attribute the origin of the fire to such a cause, when a reasonable and probable explanation is at hand in the use of the open flame torches."

The petitions for limitation of liability were denied in both cases.

II.

The questions presented are of great commercial importance: a high percentage of losses of cargo at sea results from fires on shipboard, and the cargo owner is rarely in a position to offer direct evidence of the precise cause of the fire which destroys his cargo, although he may be able to establish by subsequent survey or other

investigation that the vessel owner's neglect permitted a condition presenting the danger of fire to exist, and he may be able to rebut evidence as to other possible causes, where any such evidence is offered.

Although the language of the Fire Statute is conditional, the decision in the present case, in effect, nullifies the condition and makes the shipowner's exemption absolute; for the shipowner can always suggest some theory on which he would not be liable, provided he is not required to produce any evidence in support of his theory.

III.

The decision in the present case rests upon an erroneous interpretation of this Court's decision in the case of *Earle & Stoddart* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420. The *Earle & Stoddart* case is cited and relied upon by both of the lower courts, although it did not involve any question of causal relation, which is the only question involved here. It appears to be interpreted in the Second Circuit as requiring that the Fire Statute be strictly construed against the cargo owner, and as precluding any inferences from established facts, such as are normally drawn in other cases. On this point we cite the following passages from the opinion of the District Court (R. 1330-1331):

> "I am satisfied that the 'Silvercypress' was unseaworthy on voyage 16 and throughout voyage 17 up to the time of the fire, in the way of the auxiliaries, by reason of the neglect of the owners, but the libelants have failed to establish that the cause of the

fire was *solely* attributable to such unseaworthiness." (Italics ours.)

* * *

(R. 1332):

"The respondents sacrificed that care and caution which they were obligated to exercise to insure protection and safety to the vessel.

The limitation of turn-arounds in port and the reluctance to spend money for shore labor outside of Hong Kong demonstrates this. The failure to have the vessel overhauled at Hong Kong after notice of conditions on voyage 16, from New York to Capetown, or at Manila, and the certification by Cropley that the vessel was seaworthy when she sailed from New York on voyage 17 deserves condemnation. *But considering the history of the fire statute* (See *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420, and references there cited) *I feel it must be strictly construed, and therefore the libels are dismissed, without costs.*" (Italics supplied.)

Wherefore, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases entitled on its docket:

"Hoskyn & Co., Inc., et al., Libellants-Appellants, v. Silver Line, Ltd., Respondent-Appellee, Docket #19145; International Standard Electric Corp., et al., Libellants-Appellants, v. Silver Line, Ltd., Respondent-Appellee, Docket #19146; and China General

Edison Co., Inc., Libellant-Appellant, v. Silver Line, Ltd., Respondent-Appellee, Docket #19147;

and that the said decrees of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray, etc.

HOSKYN & CO., INC.;
CIA GRAL DE TABACOS DE FILIPINAS;
LIZARES & CO., INC.;
PACIFIC COMMERCIAL COMPANY;
CASTELLS Y CIA;
ELIZALDE & CO., INC.;
INTERNATIONAL STANDARD ELECTRIC CORPORATION;
A. E. CHEW;
CHINA GENERAL EDISON CO., INC.,
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